IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
Petitioners

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION OF THE DISTRICT OF COLUMBIA BAR FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the District of Columbia Bar hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in the above-captioned case. The brief supports the position of the petitioners that there is no "learned profession" exemption to the Sherman Act rendering the Act inapplicable to fee schedules promulgated by attorneys or groups of attorneys.

The attorney for petitioners, Alan B. Morrison, Esq., and the Office of the Attorney General of Virginia, attorney for respondent Virginia State Bar, have consented to the filing of a brief by the District of Columbia Bar. The attorneys for respondent Fairfax County Bar Association, Hunton, Williams, Gay and Gibson, Esqs., have objected to the filing of a brief *amicus curiae* by the District of Columbia Bar.[1]

The interest of the District of Columbia Bar as *amicus curiae* is set forth at pages 1, 2 and 3 of the attached brief. This case presents significant questions relating to the legal profession throughout the United States arising in the context of a private law suit. We believe that this Court should have the benefit of the views of the organized bar on a matter which may greatly affect the delivery of legal services and public confidence both in the legal profession and the administration of justice. We wish to bring to this Court's attention the experience and views of members of a

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[1] The letters from counsel have been supplied to the Clerk of this Court together with this motion and brief.

unified bar association located in an important jurisdiction, the District of Columbia.[2]

Respectfully submitted,

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December 1974

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[2] In a recent case, *Angarano* v. *United States*, No. 7006, decided December 2, 1974, the District of Columbia Court of Appeals held that it was unnecessary to resolve what it termed "the constitutional problems presented by the submission of an amicus brief purportedly expressing the position of the total membership of a compulsory bar. . . ." (p. 1354) It accepted an *amicus* brief of the D. C. Bar in that case as one filed on behalf of the Board of Governors of the unified bar. (*Id.*)

Since the *Angarano* decision, the Board of Governors has adopted comprehensive procedures for notifying the membership of the bar of a proposed *amicus* brief and for taking account of dissenting views. These procedures, which we believe to be the first of this character adopted by any bar in the United States, are in full conformity with the Court's decisions in *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961); and *Brotherhood of Railway & S.S. Clerks* v. *Allen*, 373 U.S. 113 (1963).

Because of the time necessary to comply with these procedures with respect to the present brief, it was not possible to file it by December 20, 1974, the filing date of petitioners' brief. Copies of a draft of the brief, however, were sent to the parties on December 19, 1974, and no changes of substance have been made in the brief as filed herewith. Accordingly, respondents have not been in any way prejudiced.

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BRIEF FOR THE DISTRICT OF COLUMBIA BAR AS AMICUS CURIAE

THE INTEREST OF AMICUS CURIAE AND THE ISSUE DISCUSSED HEREIN

The District of Columbia Bar is the unified bar association of all lawyers admitted to practice law in the District of Columbia. It was established in 1972 pursuant to Rules of the District of Columbia Court of Appeals, acting under the authority of the District of

Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 11 D.C. Code § 2501 (Supp. IV, 1971). The purposes of the D.C. Bar are "to aid the court in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence in public service, and high standards of conduct; to safeguard the proper professional interest of the members of the Bar; . . . to the end that the public responsibility of the legal profession may be more effectively discharged." (Rule I, Section 2).

The officers and Board of Governors of the Bar are elected by written ballot by the full membership. The District of Columbia Bar has over 18,000 members and is the fourth largest bar association in the country.

The District of Columbia Bar believes that the decision of the Fourth Circuit is erroneous in holding that the practice of law, as a "learned profession," is exempt from the coverage of the Sherman Act, 26 Stat. 209, as amended; 15 U.S.C. § 1.[1] *Amicus* submits that commercial restraints on competition by lawyers, such as price fixing (including the promulgation of fee schedules), violate the Sherman Act. A definitive determination by this Court of this issue is of exceptional importance to the public and to the legal profession. The holding below that "learned professions" are engaged neither in trade nor com-

[1] This brief does not discuss and *amicus curiae* takes no position with respect to the "state action" and commerce issues also before this Court or with respect to whether a ruling by this Court that the Sherman Act is applicable on the facts herein should be given prospective effect only or retroactive effect.

merce is so at odds with reality as to diminish public confidence in the law and the legal profession. That confidence is critical to the proper functioning of our system of law. The profession does not require any general exemption from the antitrust laws to regulate the ethical conduct of lawyers. The holding below also opens the door to immunization of restrictive practices in other "learned professions" which run directly contrary to the policy of the antitrust laws and the interests of the public.

ARGUMENT

I. There Is No "Learned Profession" Exemption Immunizing Lawyers from the Proscription of the Sherman Act

Price fixing has long been condemned as the most serious restraint upon trade and commerce and one in which the character of the offense removes it from the operation of the rule of reason. Although some forms of restraint upon trade may be subject to analysis by courts, under the rule of reason, price fixing has long been held to be a *per se* violation of Section 1 of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1 at 5 (1958).

Price fixing of legal services works a particular harm to the public because of the continuing necessity for these services on a regular basis and because no alternative sources exist.

The importance of price competition in the sale of legal services is underscored by two factors which distinguish them from other types of services rendered to the public: (1) virtually all members of the public require some legal services at some time, and (2) unlike some consumer service requirements, legal services

are non-deferrable. A buyer concerned that price fixing has resulted in an over-valued price may defer purchase of a household appliance or a lawn care service; but one needing shelter must obtain an assurance of a valid title before closing purchase of a house; an estate must be probated in order to distribute the assets; litigation cannot be delayed until the cost of legal services is reduced.

It is noteworthy that the non-deferrable services for which there is the most widespread continuing need are those provided by the so-called "learned professions." Medical, dental and legal services, more than any others, must be utilized when needed irrespective of price. Thus, there is a compelling social necessity to carry out the purpose of the Sherman Act by providing these services in an atmosphere free of price restraint.

It is ironic that minimum fee schedules were promulgated in the past as part of ethical codes to guide the conduct of attorneys, since it is the public interest which the ethical codes are designed to protect. Ethical codes were not supposed to benefit attorneys at the public's expense. Yet fee schedules, as in the case at bar, may be based on factors unrelated to the complexity of the legal issue, the skill or experience of the attorney, or the time devoted to the matter.[2] The consumer of legal services, a proper and intended beneficiary of ethical codes, thus is victimized by fee fixing in precisely the way which the Sherman Act sought to eliminate.

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[2] Each of the twenty attorneys responding to petitioners' inquiry indicated that, in accordance with the minimum fee schedule of respondent Fairfax County Bar Association, the fee for a title search would depend solely on the value of the property being purchased.

The Fourth Circuit's holding that fee fixing by lawyers does not violate the Sherman Act because "learned professions" do not constitute trade or commerce requires reversal. It adversely affects public confidence in the law and the legal profession and is incorrect as a matter of law. Public confidence in legal instiutions will be shaken if the highest court of the land rules that lawyers and a handful of other "learned professionals" are exempt from laws of general applicability, particularly where the legislation by its terms contains no such exemption. Exemption of the legal profession would inevitably be perceived as self-serving and inconsistent with the reality confronted by the average citizen seeking legal services. To the public, consulting a lawyer is a commercial transaction, notwithstanding any desire to obtain advice of a professional nature. In transacting business with lawyers, the public is entitled to the protection of the Sherman Act.

The Sherman Act's design and importance to our free enterprise system has been described aptly by Chief Justice Hughes in *Appalachian Coals* v. *United States*, 288 U.S. 344, 359-60 (1933):

> "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

and by Mr. Justice Black in *Northern Pacific Railway Company* v. *United States, supra*, 356 U.S. at 5:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at

> preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

These principles are as true today as when written.

This Court has never, as a matter of law, immunized from the Act's coverage conduct engaged in by members of a so-called 'learned profession."[3] There is no basis in the language of the Sherman Act to support the subtraction of such a vast segment of our economy from that fundamental charter of our economic system.

The Fourth Circuit Court's observation (497 F.2d at 13) of the existence of an historical development of a "learned profession" exemption from the scope of the antitrust laws was proffered without citation of authority or precedent. It did, however, cite two Supreme Court cases[4] for its conclusion that such an

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[3] In *American Medical Ass'n* v. *United States*, 317 U.S. 519, 528 (1943) and *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 491-92 (1950), the Court expressly reserved consideration of the issue.

[4] *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 653 (1931); *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). In the interest of avoiding duplication, the analysis of these cases by the Court below and their impact on the issue at bar will not be treated here, since the subject will be amply briefed by others. Suffice it to say that *amicus* is of the opinion that those cases do not support any exemption from the antitrust laws for lawyers.

exemption from the Sherman Act exists. The reasoning of the Court below is difficult to understand, since it conceded that this Court subsequent to *Raladam* and *Federal Baseball* had expressly deferred a decision on the issue, *American Medical Ass'n* v. *United States, supra; United States* v. *National Ass'n of Real Estate Bds., supra.* Yet the Fourth Circuit rested its conclusion on those earlier cases.

This Court has emphasized the importance of applying the Sherman Act's commands to the provision of services by professions:

> "The [Sherman] Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services'." *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 490.

Numerous cases have held professional activities subject to the Sherman Act.[5] Noting the commercial aspects of one "profession," this Court observed:

> "We have said enough to indicate we would be contracting the scope of the concept of 'trade,' as

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[5] See *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (real estate brokerage fees); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (news services); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (insurance underwriting); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (1943) (medical and hospital services); *Levin* v. *Joint Comm'n on Accreditation*, 354 F.2d 515 (D.C. Cir. 1965) (hospital accreditation); *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379 (9th Cir. 1962) *cert. denied*, 371 U.S. 862 (pharmacy); *United States* v. *American Pharmaceutical Ass'n*, 344 F. Supp. 9 (E.D. Mich. 1971) (pharmacy); *Friends of Animals* v. *American Veterinary Medical Ass'n*, 301 F. Supp. 1016 (S.D.N.Y. 1970) (veterinary medicine). *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah 1962), *aff'd*, 371 U.S. 24 (pharmacy).

> used in the phrase 'restraint of trade,' in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit." *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 492.

The legal profession, the medical profession, indeed all professions, are also engaged in commercial activity for a profit. As this Court recently noted:

> "We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of free enterprise." *Fuller* v. *Oregon,* 417 U.S. 40, 53 (1974).

Many "professions" require some degree of learning or a skill level above that possessed by the average member of the community. Special tests are frequently required before governmental jurisdictions will permit citizens to hold themselves out as competent to practice in a particular profession. The District of Columbia, for example, requires examinations prior to license of beauticians, 2 D.C. Code, §§ 1301 *et seq.;* barbers,. 2 D.C. Code §§ 1103 *et seq.;* and real estate brokers, 45 D.C. Code, §§ 1401 et seq. It would be incongruous to contend, however, that persons engaged in these trades or aspects of commerce are exempt from the proscriptions of the Sherman Act because of the special skill required to perform these activities.

A higher degree of learning and intellectual attainment required of those who practice law may be a source of pride to the profession, but it hardly serves to render that profession devoid of commercial

aspects.[6] In fact, the vast majority of attorneys engaged in the practice of law do so as a means of earning their livelihood. At the least, those in private practice are engaged in a "trade or commerce."

II. A "Learned Profession" Exemption From the Antitrust Laws Is Not Necessary for the Maintenance of High Ethical Standards in the Legal Profession

The maintenance of high ethical standards by lawyers is a principal concern of the organized bar. In some jurisdictions bar associations have been officially delegated responsibility for discipline of lawyers; in others they participate informally.

Amicus considers a blanket exemption of the legal profession from the antitrust laws as to internal matters of the profession unnecessary to the maintenance of high ethical standards in the profession. *Amicus* has no fee schedules and has a role to play in assuring ethical standards. No impediment to the maintenance of high ethical standards resulting from the absence of any fee schedule has been perceived.

A "learned profession" exemption ignores the impact of a restrictive activity on the public. It prevents the courts from considering whether a particular restraint is reasonable in light of the underlying ethical considerations to which that restraint is addressed. The Court below thus adopted a *per se* exclusion, rather than the traditional approach in antitrust law which examines each restrictive practice to

[6] The District Court in Oregon recently held the fee schedule of the Oregon State Bar subject to the Sherman Act. *United States* v. *Oregon State Bar*, Civ. No. 74-362, (D. Ore. 1974). The Court, in an opinion dated November 22, 1974 (as yet unpublished), after examining the arguments with respect to the so-called "learned profession" exemption, concluded that fee schedules are clearly commercial and rejected any immunity for the legal profession.

determine whether the restraint is unreasonable. *Standard Oil Co.* v. *United States,* 221 U.S. 1, (1911)

The threshold question is whether the restriction at issue is commercial. If it is not commercial, the Sherman Act may not come into play at all. *Apex Hosiery* v. *Leader,* 310 U.S. 469 (1940). If it is commercial, the conduct must then be examined to ascertain whether it is *per se* unreasonable, *Northern Pacific Railway Company* v. *United States, supra.* If it is not a *per se* violation, the Court must determine whether it is unreasonable in light of the nature of the trade or commerce involved, *Standard Oil Co.* v. *United States, supra, cf. White Motor Company* v. *United States,* 372 U.S. 253 (1963), or reasonable in light of all the facts concerning the market affected, *Chicago Bd. of Trade* v. *United States,* 246 U.S. 231 (1918). The case at bar presents a purely commercial restriction and a *per se* offense, the fixing of fees. We know of no other restraints on attorney conduct imposed by ethical codes or bar associations which will have as direct a commercial impact without relationship to ethical conduct by attorneys.

Amicus submits that the above-described process is the proper approach under the antitrust laws, whether for "learned professions" or others. A similar approach was set forth by the Court of Appeals for the District of Columbia in *Marjorie Webster Junior College* v. *Middle States Ass'n of Colleges and Secondary Schools,* 432 F.2d 650 (D.C. Cir. 1970), *cert. den.,* 400 U.S. 965 (1970). That Court had already rejected the "learned profession" exemption.[7] In

[7] See *United States* v. *American Medical Ass'n,* 110 F.2d 703 (D.C. Cir. 1940), *cert. den.,* 310 U.S. 644 (1940); *American Medical Ass'n* v. *United States,* 130 F.2d 233 (D.C. Cir. 1942), *aff'd on other grounds,* 317 U.S. 519 (1943).

Marjorie Webster Junior College, an antitrust challenge was raised against the educational accreditation process by a school denied accreditation. The Court made no attempt to exclude non-profit educational institutions from the antitrust laws. Rather it examined the particular *conduct* challenged in light of the nature of the activity of the institution involved and the policy of the antitrust law.

In making such a review of standards of conduct the courts are entitled to give appropriate weight to the judgments of the profession as to the necessity or justification for a particular restriction.

> "The extent of judicial power to regulate the standards set by private professional associations, however, must be related to the necessity for intervention. Particularly when, as here, judicial action is predicated not upon a legislative text but upon the developing doctrines of the common law, general propositions must not be allowed to obscure the specific relevant facts of each individual case. In particular, the extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the Association's action." [Footnotes omitted.]

Marjorie Webster Junior College v. *Middle States Ass'n of Colleges and Secondary Schools, supra,* 432 F.2d at 655-56; *cf. United States* v. *Oregon Medical Society,* 343 U.S. 326 (1952).

This approach judges conduct in light of the legitimate needs of the profession and the public and offers the proper framework for review of restrictive practices in a time when important structural changes are occurring in the learned professions.

> "Profound changes in social and economic conditions have forced members of all professional

> groups to make readjustments. The fact that these changes may result even in depriving professional people of opportunities formerly open to them does not justify or excuse their use of criminal methods to prevent changes or to destroy new institutions. Lawyers, too, have seen, during recent decades, large scale changes in their professional work. There was a time when lawyers worked entirely on fee or retainer in particular cases and controversies; now many of them are salaried employees on the staffs of large corporate industrial and financial organizations. Many of the simpler functions of business which once required the assistance of lawyers are now the routine work of better educated and more highly skilled business men; some of them law school graduates. Recent legislation has had the effect of removing from the field of judicial controversy and determination, a large percentage of cases which at an earlier time constituted the mainstay of lawyers' practice." [Footnotes omitted.]

American Medical Ass'n v. *United States, supra,* 130 F.2d at 245. These words, written thirty years ago, are even more descriptive of the situation today.

The complexity of the issues raised by the application of the antitrust laws to the "learned professions" and the undesirability of a *per se* exclusion become apparent when one considers the variety of practices which may be utilized by the various professions. Physicians, optometrists, dentists, accountants, engineers, architects, psychologists, pharmacists, to name only some, may all claim a similar exemption. The Justice Department has only recently filed suits against organizations of accountants, engineers and architects involving restraints on competition among members of the profession. See 60 ABA Journal 1410, 1411 (Nov.

1974). Consulting organizations or multi-disciplinary groups of "learned professionals" also may seek to claim the exemption. The substantial impact of professional activities on the national economy dictates against the granting of widespread or blanket exemptions to the antitrust laws.

CONCLUSION

A "learned profession" exemption removing lawyers from the strictures of the antitrust laws is inconsistent with the purposes of those laws and contrary to the realities associated with the practice of law. Price fixing by lawyers violates the Sherman Act. Accordingly, the Fourth Circuit ruling setting forth a "learned profession" exemption for lawyers should be reversed.

Respectfully submitted,

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